CIVIL SERVICE COMMISSION MINUTES

JUNE 17, 1998

A regular meeting of the Civil Service Commission was held at 2:30 p.m., in Room 358 at the County Administration Building, l600 Pacific Highway, San Diego, California.

Present were:

Gordon Austin, President
Roy Dixon, Vice-President
Mary Gwen Brummitt
Gloria Valencia-Cothran
Sigrid Pate

Comprising a quorum of the Commission

Larry Cook, Executive Officer
Ralph Shadwell, Deputy County Counsel
Joy Kutzke, Reporting

CIVIL SERVICE COMMISSION MINUTES
June 17, 1998

1:30 p.m. CLOSED SESSION: Discussion of Personnel Matters and Pending Litigation

2:30 p.m. OPEN SESSION: Room 358, 1600 Pacific Highway, San Diego, California 92l0l

PRE-AGENDA CONFERENCE

Discussion Items	**Continued**	**Referred**	**Withdrawn**
4,5,6,7,8,13			

Motion by Dixon to approve all items not held for discussion; seconded by Brummitt. Carried.

CLOSED SESSION AGENDA
County Administration Center, Room 458
(Notice pursuant to Government Code Sec. 54954.2)
Members of the Public may be present at this location to hear the announcement of the Closed Session Agenda.

a. Commissioner Austin: Deborah Olberding, S.E.I.U., Local 2028, on behalf of **Adell Burge,** an employee in the Department of the Public Defender alleging union affiliation discrimination by the Departments of the Public Defender and Human Resources.

b. Commissioner Valencia-Cothran: Michael Seyle, Esq., on behalf of **James M. V. Fitzpatrick, Esq.** appealing an Order of Termination from the District Attorney.

REGULAR AGENDA

NOTE: Five total minutes will be allocated for input on Agenda Items unless additional time is requested at the outset and it is approved by the President of the Commission.

INTRODUCTION

1. Introduction of Sigrid Pate, newly appointed Civil Service Commissioner.

Gordon Austin, President, introduced Sigrid Pate who was appointed to serve on the Commission by Supervisor Pam Slater. Commissioner Pate has replaced former Commissioner Paul Thomas.

MINUTES

2. Approval of the Minutes of the regular meeting of June 3, 1998.

Approved.

CONFIRMATION OF ASSIGNMENT

3. Commissioner Brummitt as hearing officer in the appeal of **Henry J. Ramos** from an Order of Pay Step Reduction from the Sheriff.

Confirmed.

DISCIPLINARY FINDINGS

4. Commissioner Valencia-Cothran: Michael Seyle, Esq., on behalf of **James M. V. Fitzpatrick, Esq.**, appealing an Order of Termination from the District Attorney.

Phillip Kossy, Esq., on behalf of the District Attorney, addressed the Commission setting forth the core issues involved in this matter which would cause the affirmation of the appointing authority's discipline. Mr. Seyle, Esq., on behalf of Mr. Fitzpatrick, responded rationalizing as to the reasons to not uphold the termination.

FINDINGS AND RECOMMENDATIONS:

OVERVIEW

In June and July of 1994, James Fitzpatrick (hereinafter referred to as Employee) tried the case of People v. Jemal Kasim and Matthew Miner.

The case involved a shooting on October 26, 1989, in which Abdul Mustafa was shotgunned -- first in the leg and then in the stomach -- at his produce store. Mr. Mustafa lost his right leg and nearly died. Investigation disclosed that Jemal Kasim had hired Enrique Gonzalez, Simon Jara, Matthew Miner and another to shoot Mustafa.

Gonzalez and Jara agreed to cooperate in the prosecution of Kasim and Miner (the alleged shooter). The reasons for the cooperation of Gonzalez and Jara were substantial issues in the criminal trial. Before their testimony, the defense made claims that agreements were reached between the prosecution and the witnesses in order to induce their testimony. The defense claimed that the witnesses had expectations of favorable treatment in exchange for their testimony. The Court ordered that all benefits or potential benefits to the witnesses Gonzalez and Jara be disclosed by the prosecution.

Employee responded to the Court and defense counsel that the witnesses would be charged for their part in the crime, the District Attorney's Office had made no deals in exchange for their cooperation, and that the District Attorney's Office's sole commitment to Gonzalez and Jara was that it would be fair to them after the trial.

Employee was aware that Gonzalez could have been deported as a result of an I.N.S. deportation hearing on May 13, 1994, prior to the commencement of the Kasim/Miner hearing. Gonzalez was the coordinator and participant in the Mustafa attack, and since he (Gonzalez) had previously confessed to the crime he was an essential witness who was needed to convict Kasim and Miner. It was reasonable for Employee to explore any legal measure to ensure that Gonzalez would fully cooperate at the Kasim/Miner hearing and be present and cooperate at any subsequent hearings. Gonzalez had made a witnessed confession to the police which could have been used at the trial absent his ability to testify in person or he could have been put in police custody to ensure he would be available to testify. Instead Employee chose to discuss the matter with Gonzalez's immigration attorney, Marci Ancel. She had a mutual interest with Employee to prevent Gonzalez from being deported. Employee wrote two letters to Ancel to discourage the deportation of Gonzalez; letters that Employee knew Ancel would use before the I.N.S. for this purpose. In the June 23, 1994 letter to Ancel, Employee stated in part " . . . I expect that the trial will conclude within two weeks. Following that, the District Attorney will make certain decisions regarding Enrique Gonzalez, including decisions which may affect Gonzalez's **past criminal convictions**, and decisions about future criminal charges . . . ". (Bolding added). By using the term "past criminal convictions", Employee gave a strong inference to Ancel, Gonzalez, and the I.N.S. that the D.A. may seek expungement which, in the view of this Hearing Officer, would be a benefit to Gonzalez. This is the primary benefit that was not related to the court and opposing counsel in the Kasim/Miner case.

Following the Kasim/Miner hearing an evidentiary hearing was conducted by Superior Court Judge William Mudd regarding a petition from Kasim on the subject of habeas corpus. A report was prepared by the judge following that evidentiary hearing entitled

"Factual Determinations Per Appointment Of Referee". The judge concluded that Employee was not truthful regarding several matters relating to the Kasim/Miner hearing, including Employee's knowledge about benefits given to Gonzalez.

Other facts relating to the Kasim/Miner hearing are addressed below along with facts relating to another hearing under the names Harrell/Wilson.

FINDINGS

Most of the following Findings and Conclusions will follow a quotation of each separate charge that is bolded for easier recognition. Causes (such as dishonesty) will also be quoted.

CAUSE I: You are guilty of dishonesty under Civil Service Rule 7.2(d). You are guilty in that:
A. As an officer of the court and a public prosecutor you have a duty of complete candor and honesty in the cases you prosecute. In violation of these duties in the Kasim/Miner case you lied to opposing counsel and the Court on an important discovery matter. Prior to trial in the Kasim/Miner case defense counsel made both an informal letter request and a formal discovery motion seeking disclosure of all information relating to the informant status of Gonzalez, including information about all benefits received by Gonzalez as a result of this status. You knew that law enforcement intended to claim an Evidence Code section 1040 et seq. official information privilege as to such information as to both Gonzalez and Jara. In your letter to defense counsel dated March 21, 1994, you were dishonest and misled counsel in response to the above discovery request by claiming that all the information you had was included in the discovery provided and by stating, "I do not believe at this time that additional discoverable material exists in this case." In your formal discovery motion opposition you mislead the Court and counsel by stating in response to the above discovery request: "The People have made, and will continue to make, all discoverable material available to the defense. The People submit there is no dispute as to [this defense request]." You were dishonest and misled the Court and counsel in these responses by not informing them that potentially discoverable matter relating to the informant status of Gonzalez and Jara existed, but that this information would not be disclosed because it was subject to a claim of privilege.

1. Cause I.A. was proven to be true. The proven charge of dishonesty to the court and opposing counsel in the Kasim/Miner case is very important to this disciplinary action. Employee falsely claimed, and misled the court and opposing counsel, when he stated that he had provided all discovery material and did not disclose that there were other potentially discoverable matters relating to the informant status of Gonzalez and Jara. Employee asserted that matters were not discoverable because they were subject to a claim of privilege, and that he therefore had no obligation to disclose the matters to the court and opposing counsel.

Judge Mudd was asked whether Employee's statements were accurate in his March 21, 1994 letter to attorney John Cotsirilos. Judge Mudd responded by stating "NO". The judge was further asked to respond to Employee's statement in his March 21, 1994 letter " . . . please note that all the information which I have concerning this case is included in the Discovery. I do not believe at this time that additional discoverable material exists in this case". Judge Mudd responded by saying " . . . This is an incorrect statement. DDA Fitzpatrick knew, or as the prosecuting attorney, should have known, that police records regarding favorable treatment and past cooperation on both Simon Jara . . . and Enrique Gonzalez. . . existed. Some of this information (i.e. Detective Musgrove. . .being present at Gonzalez's sentencing.) was not privileged. . .". It was Det. Musgrove who had brought Gonzalez in to give information about the Mustafa shooting and who ultimately granted favorable treatment to Gonzalez in exchange for the information. That information should have led Employee to make sure that the court and the opposing counsel were not misled as to the potentially discoverable matters relating the informant status of Gonzalez and Jara.

Prior to the Kasim/Miner hearing in 1994, Employee was likely aware of discoverable matter that may have been privileged. Judge Mudd's interpretation of Employee's awareness, as described above, is generally accepted by this Hearing Officer. However, there may be a fine line between what is and is not discoverable and what is and is not privileged. In this case there were likely several fine lines crossed by Employee in that he was not completely forthright in his responses to the court and opposing counsel, and he failed to seek guidance from the court as to what was discoverable and what was privileged. Employee was dishonest as charged by the department.

B. As an officer of the court and a public prosecutor you have a duty of complete candor and honesty with the Court. When called as a witness you have a legal obligation "to tell the truth, the whole truth and nothing but the truth." In your sworn declaration and your sworn testimony at the Kasim evidentiary hearing you were dishonest and lied to Judge Mudd about conversations you had with defense counsel regarding your knowledge of the existence of potentially discoverable but privileged information about the informant status of Gonzalez and Jara. Despite the unqualified assurances in your formal and informal discovery responses before the Kasim/Miner trial that full discovery had been provided to the defense, your declaration states that you had orally notified defense counsel that potentially discoverable matter relating to the informant status of Gonzalez and Jara existed, but that this information would not be disclosed because it was subject to a claim of privilege which needed to be litigated in camera. (Declaration pp. 9, 11-14.) You repeated this claim during your testimony before Judge Mudd. (Kasim Enid. H.G. R.T. pp. 276-281.) Defense counsel testified that you made no such statements to them. (Kasim Enid. H.G.. R.T. pp. 893-895, 1047.) In his factual findings as a referee for the Court of Appeal, Judge Mudd found that your testimony on this issue was untruthful. (Fact Determinations ..., p. 2.)

2. Cause I.B. was proven to be true.

C. As an officer of the court and a public prosecutor you have a duty of complete candor and honesty with the Court and opposing counsel. In open court on June 13, 1994, during the Kasim/Miner discovery motion hearings before Judge Gill, you made dishonest and misleading statements to opposing counsel and the Court. During that motion defense counsel stated: "And I take the comments of the District Attorney's to be that there are no promises or hopes of leniency extended by his office to either witness and that no benefits or leniency have been afforded to either witness at this point in time in relationship to this case." You answered unequivocally, "That is correct, your Honor." (Kasim Trial R.T. p. 225.) While the majority of your answer conformed to the statements made to Gonzalez and Jara and their counsel up to that point [that both would be charged for their involvement in the Mustafa shooting, that the District Attorney's Office would make no deals with them for their cooperation and truthful testimony against Kasim and Miner, and that they simply had to trust the District Attorney's Office to be fair with them], you were dishonest and misled the Court and defense counsel by stating that this arrangement offered them no "hopes of leniency." As

you later admitted at the Kasim evidentiary hearing, you expected that both Gonzalez and Jara would get sentenced more leniently if they cooperated with you in the Kasim/ Miner prosecution. (Kasim Evid. Hrg. R.T. p. 379.)

3. Cause I.C. was proven to be true with mitigating circumstances. Under the circumstances both the judge and the opposing counsel reasonably should have known that witnesses cooperating with the D. A. would have hopes of leniency in return for their testimony. It is unlikely that Employee's statement to the effect that his arrangement with the witnesses offered them no hopes of leniency materially misled the judge or opposing counsel.

D. A Deputy District Attorney is obligated to follow appropriate instructions of his or her supervisors. You violated the instructions of your supervisors in your handling of the cooperating accomplice witness Gonzalez prior to and during the Kasim/Miner prosecution. Throughout the Kasim/Miner investigation and prosecution you were under very specific instructions from your superiors, including then Assistant District Attorney Richard Neely, to make no assurances, promises or agreements with Gonzalez or his counsel in exchange for his testimony. You were specifically instructed to inform Gonzalez and his attorney, that he would be charged for his involvement in the Mustafa shooting, that the District Attorney's Office would make no deals with him for his cooperation and truthful testimony against his accomplices, and that he simply had to trust the District Attorney's Office to be fair with him. You were dishonest and violated these specific instructions, in several respects:

1. Prior to initiating the Kasim/Miner prosecution in late 1993 you promised Gonzalez that he would be given advance notice before being charged or arrested. (Declaration, p. 4; Kasim Evid. Hrg. R.T. p. 261-265.)

2. During the Kasim/Miner trial you made express or implied assurances or promises to Gonzalez and his attorney that you would take steps to prevent Gonzalez from being deported, including possibly taking actions to expunge his prior convictions. Before Gonzalez testified you learned the I.N.S. was attempting to deport Gonzalez based on his prior convictions and you learned that a deportation hearing was imminent. You were contacted by Gonzalez's immigration attorney, Marci Ancel, and asked to write a letter in support of her request for a continuance of the upcoming deportation hearing. Before writing the letter you contacted an attorney at the I.N.S. and discussed ways to prevent Gonzalez from being permanently deported from the United States, including the possibility of expunging the prior convictions which formed the basis for the deportation petition filed against Gonzalez. You then wrote a letter to Ms. Ancel and presented it to her at the District Attorney's Office on the morning of June 24, 1994. Gonzalez was present nearby at that time because he was just about to take the stand and testify against Kasim and Miner. (Kasim Evid. Hrg. R.T. pp. 455-456, 459.) In the June 23, 1994 letter to Ms. Ancel you wrote that after the Kasim/Miner trial "the District Attorney will make certain decisions regarding Enrique Gonzalez, *including decisions which may affect Gonzalez's past criminal convictions*, and decisions about future criminal charges." The reference to past criminal convictions is clearly a reference to the possibility of expungement. During the Kasim trial you had no authority to make any assurance or promise to Gonzalez and his attorney that the District Attorney's Office would consider taking actions regarding Gonzalez's past criminal convictions including expungement. Your unequivocal instructions were to make no such assurances or promises. Your behavior thereafter is further evidence that you had made an express or implied assurance or promise to intervene in Gonzalez's deportation matter in exchange for Gonzalez's testimony in the Kasim/Miner trial. For example, you wrote a second letter to Marci Ancel dated July 13, 1994, again knowing such letter would be used to support her request to continue the deportation hearing set that day. In that letter you wrote "it is in our interest to have Enrique Gonzalez remain in the United States so that he may be prosecuted ... ." You later took steps to actually expunge Gonzalez's past criminal convictions. As discussed elsewhere, you attempted to cover up your knowledge and involvement in Gonzalez's deportation action during the Kasim/Miner trial by not maintaining copies of these two important letters to Marci Ancel in the District Attorney's file and by misleading members of the District Attorney's Office reviewing the matter as to when you learned of Gonzalez's deportation problems.

4. Cause I.D. (including the numbered paragraphs 1 and 2 under I.D.) was proven to be true with mitigating circumstances. Mr. Carlton, the DDA V Skelly hearing officer in this disciplinary action stated in his Skelly report: ". . . The motivation for telling Mr. Gonzalez he'd be notified was purportedly in concern for his preparing for his family's safety should he be taken into custody. In the grand scheme of things, this was a minor matter and one that Mr. Fitzpatrick (may) have not considered when asked about benefits some time later . . . I contend, while Mr. Fitzpatrick should have told the court and counsel about this promise, I can't say the failure to do so was intentional under the circumstances . . .". The undersigned concludes that it may have been unintentional by Employee to not disclose this information, but he was remiss in not doing so.

Charge 1.D.2. goes to the heart of the case against Employee. The actions taken by Employee during the trial relating to Mr. Gonzalez's deportation hearings clearly should have been disclosed. The actions were in clear violation of the instructions from Employee's supervisor to make no assurances or promises to Gonzalez in exchange for his testimony.

As indicated later in these Findings and Conclusions, it was not proven that the absence of copies of the two letters to Marci Ancel from the D. A. Files was the fault of Employee.

The involvement of D. A. management in the expungement of Gonzalez's past criminal convictions and the extent to which management was misled will also be discussed later in these Findings and Conclusions.

E. As a public prosecutor you are under a legal and ethical duty to inform defense counsel of any promises or benefits given to important prosecution witnesses, particularly informants and accomplices, in exchange for their testimony in a criminal case. This duty is constitutionally based because it so important to a criminal defendant's right to confront and cross-examine witnesses, as well as a criminal defendant's fundamental right to a fair trial. (*Brady v. Maryland,* 1963, 373 U.S. 83). You seriously breached this duty in the Kasim/Miner trial to such a degree that reversal of Kasim's conviction by the appellate court appears likely. During the Kasim/Miner prosecution you were under a legal and ethical duty to inform defense counsel of any promises or benefits given to either of the cooperating accomplice witnesses, Gonzalez and Jara. In addition, during the Kasim trial you were specifically ordered by Judge Gill to disclose such information to the defense. (Kasim Trial R.T. pp. 638-639.) You were dishonest and violated your legal and ethical discovery responsibilities, in addition to Judge Gill's discovery order:

1. You did not inform the defense that in late 1993 you had promised Gonzalez that he would be given advance notice before being charged or arrested for his role in the Mustafa shooting. (Kasim Evid. Hrg. R.T. pp. 488-490.)

2. You did not provide the defense with copies of the letters you wrote to Marci Ancel on June 23, and July 13, 1994, and you did not inform the defense of the circumstances surrounding the creation of these letters, including your knowledge that these letters would be used to support Ancel's request to continue Gonzalez's deportation hearing. Just the writing of the June 23, 1994 letter was a benefit to Gonzalez. As discussed elsewhere, the contents of the letter further disclose the unauthorized promises or assurances you had made to Gonzalez regarding his past criminal convictions. This letter should have been immediately disclosed to the defense, before Gonzalez took the stand.

3. You did not inform the defense that you had been in contact during the trial with attorneys at the I.N.S. discussing ways to prevent Gonzalez from being deported, including the possibility of expunging Gonzalez's past criminal convictions.

5. Cause I.E. (including paragraphs 1,2 and 3 under Cause I.E.) is proven to be true with mitigating circumstances in respect to paragraph 1. of Cause I.E. (See Finding and Conclusion No. 4 above).

F. As an officer of the court and a public prosecutor you have a duty of complete candor and honesty with the Court, opposing counsel and juries. You violated this duty by continuing to deny to Judge Gill, Judge Mudd, opposing counsel and the jury in the Kasim/Miner case that any benefits had been promised or bestowed to Gonzalez after you wrote the June 23, 1994 letter to Marci Ancel regarding Gonzalez's deportation matter and your intent to take actions regarding Gonzalez's past criminal convictions after the Kasim/Miner trial. After you wrote the June 23, 1994, letter to Marci Ancel you continued to deny that benefits had been promised or bestowed on Gonzalez:

1. During the Kasim/Miner trial on June 24, 1994, when responding to Judge Gill's discovery order of June 23, 1994, you did not tell Judge Gill that you had delivered the letter to Gonzalez's immigration attorney minutes before coming to court. (Kasim Trial R.T. p. 644.)

2. Through questioning of Enrique Gonzalez before the jury on June 24, 1994, when you elicited testimony on direct examination that no promises or deals had been made by you, any member of the District Attorney's Office, or any law enforcement officer in exchange for Gonzalez's testimony. (Kasim Trial R.T. p. 651.) The same day as this testimony, you delivered to Gonzalez' immigration attorney a letter stating, "the District Attorney will make certain decisions regarding Enrique Gonzalez, including decisions which may affect Gonzalez's past criminal convictions, and decisions about future criminal charges."

3. In your closing argument to the jury. (Kasim Trial R.T. pp. 1712, 1831, 1841-1842.)

4. In your declaration dated December 12, 1996, for the Kasim evidentiary hearing. In response to Court of Appeal question 21, whether any benefits had been given to Gonzalez at any time, including after the Kasim/Miner trial, in exchange for his testimony, your [sic.] swore under oath, "To the best of my knowledge, Gonzalez received no benefits in this case or in any other criminal case in exchange for his cooperation and truthful testimony in the Kasim/Miner prosecution." (Declaration p. 19.) This statement is clearly untrue and dishonest. The October, 1994 expungements of Gonzalez's past criminal convictions to prevent Gonzalez's deportation were done as a benefit to Gonzalez in exchange for his cooperation in the Kasim/Miner case. Even at this late stage of the Kasim habeas proceedings you still did not acknowledge that benefits had been bestowed on Gonzalez for his testimony in the Kasim/Miner case.

5. In your testimony at the Kasim evidentiary hearing before Judge Mudd. (Kasim Evid. Hrg. R.T. p. 418.)

6. Cause I.F. (including paragraphs 1, 2, 3, 4, and 5 under Cause I.F.) was proven to be true with mitigating circumstances. Cause I.F., paragraph 4, states in part, ". . . The October, 1994 expungements of Gonzalez's past criminal convictions to prevent Gonzalez's deportation were done as a benefit to Gonzalez in exchange for his cooperation in the Kasim/Miner case. . .". This statement is true, but Employee had at least partially informed his supervisors of his expungement activities. Testimony was given at the hearing that management within the D. A.'s Office at that time, including former ADA Neely and Chief (of the Gang Prosecuting Unit) Burt, were kept informed on the matter and had knowledge of the plans for expungement, and by failing to act gave tacit approval, therefore having some involvement in the court hearing where the expungements were ordered. While Mr. Neely and Mr. Burt allowed the expungements to take place subsequent to the Kasim trial, the evidence at the Commission hearing did not establish that they were aware that the expungements were agreed to by Employee prior to or during the Kasim trail or that this benefit conferred on Gonzalez by Employee was not revealed to defense counsel and the court.

G. A Deputy District Attorney is obligated to follow appropriate instructions of his or her supervisors. A Deputy District Attorney does not have the unilateral authority to forego prosecuting a felony case assigned to him for review and issuing. A Deputy District Attorney must get authorization from a supervisor in order to reject such a case for filing. A Deputy District Attorney must make a timely recommendation whether or not to prosecute such a case. A Deputy District Attorney must notify and fully inform a supervisor in a timely fashion of any significant impediment to filing such a case. Finally, a Deputy District Attorney must notify and fully inform a supervisor when he or she decides not to file such a case. You were dishonest and violated all of these duties in your handling of the Gonzalez and Jara charging decision after the Kasim/Miner case concluded. After Kasim was sentenced you were directed by former Assistant District Attorney Richard Neely to file charges against Gonzalez and Jara. Instead, on October 11, 1994, you appeared with Gonzalez and his counsel, Al Arena, and expunged Gonzalez's past criminal convictions. Two days later Gonzalez's immigration attorney made a motion to reopen the deportation case, which was on appeal, in order to present the expungement orders and get dismissal of the deportation order. Mr. Neely testified at the Kasim evidentiary hearing that he had no recollection of authorizing the expungements. In addition, he knew of no impediments to charging Gonzalez and Jara during the closing months of the Miller administration, and to the best of his knowledge the filing decision was not deferred to the new District Attorney's administration. (Kasim Evid. Hrg. R.T. pp. 981-982.) Despite your various claims that you intended to file charges against Gonzalez and Jara, it is apparent from your actions (and inactions) that you decided on your own not to file charges against Gonzalez and Jara. You carried out this unauthorized decision by permitting

this important matter to go unnoticed during the transition period between District Attorneys. You failed to inform anyone within the District Attorney's Office, including your supervisors, that you had unilaterally decided not file charges against Gonzalez and Jara.

7. The first part of Cause I.G. was proven to be true ending with the sentence, ". . . Finally, a Deputy District Attorney must notify and fully inform a supervisor when he or she decides not to file such a case. . .".

Following the Kasim trial Employee was instructed by Assistant District Attorney Richard Neely to file charges against Gonzalez and Jara, but the filing of charges was complicated by Mr. Gonzalez's immigration status, plea bargain considerations, and the change of administration in the District Attorney's Office. Employee discussed the need to charge Gonzalez and Jara with Mr. Neely and Mr. Burt on several occasions during the latter part of 1994. Mr. Neely and Mr. Burt were aware that Gonzalez and Jara had not been charged, but they took no active steps to remedy the situation. Employee's failure to charge Gonzalez and Jara was with the tacit acquiescence of his supervisors during 1994. The undersigned hearing officer agrees with Mr. Carlton's assessment of Mr. Neely's likely awareness of the case. Mr. Carlton stated:

> "Mr. Neely's memory of these matters didn't include recollection of the need to delay filing, but I think it is very strange that Mr. Neely didn't follow up and ensure the case was filed if that is what he had in fact ordered. I don't think Mr. Fitzpatrick can be faulted alone for this lack of filing in a more timely manner. It is likely that Mr. Neely was preoccupied with the election, etc. prior to the primary in June of 1994, but I can't understand why he couldn't have taken a more active role in supervising the issuance of the case thereafter. He may well have been more occupied in charting his career course at that point than another gang-related case to be sure. Regardless, given the evidence which isn't refuted by Mr. Neely that Mr. Fitzpatrick briefed him on numerous occasions about the case, the failure to file can't be solely laid on Mr. Fitzpatrick's shoulders. And, if Mr. Fitzpatrick chose to lie about the reasons, he certainly could have said that Mr. Neely had taken the decision away from him or something far more deflective of criticism than what he did say. . .".

Subsequent to 1994, however, Mr. Burt left the Gang Unit to become the Chief Deputy and Mr. Neely left the D. A.'s Office and Employee took no further action to charge Gonzalez and Jara other than possibly mentioning the lack of charging to Mr. Burt in casual conversations. The lack of charging was permitted to go unnoticed during the transition period between District Attorneys, and the issue of charging was left unresolved during 1995. It should be noted that Employee was not resistant to charging Gonzalez and Jara, for their roles in the Mustafa shooting. While Employee was primarily responsible for charging Gonzalez and Jara and could have done so, there was inaction by others which contributed to the failure of Employee to charge Gonzalez and Jara for more than a year and a half following the conclusion of the Kasim trial. Gonzalez and Jara were eventually charged for their roles in the Mustafa shooting by the District Attorney's Office long after the matter received media attention and Employee was transferred to the Gang Unit.

H. As an officer of the court and a public prosecutor you have a duty of complete candor and honesty with the Court. When called as a witness you have a legal obligation "to tell the truth, the whole truth and nothing but the truth." In your sworn testimony at the Kasim evidentiary hearing you lied to Judge Mudd as to matters discussed above regarding the charging decision as to Gonzalez and Jara. Specifically you were untruthful in testifying: (1) You intended all along to prosecute Gonzalez and Jara including after the Kasim/Miner verdict, (2) Gonzalez's immigration matter needed to be resolved before Gonzalez and Jara could be prosecuted, and (3) The decision to prosecute Gonzalez and Jara was put over to the new District Attorney's administration. (Kasim Evid. Hrg. pp. 320-321, 328-330, 339-341, 463, 515, 526-528.) In his factual findings as a referee for the Court of Appeal Judge Mudd found that your testimony on these significant issues was untruthful. (Fact Determinations ..., pp. 10-11, 14.) Instead, Judge Mudd found that as a result of either your secret agreement with Gonzalez or your own unilateral decision, you failed to pursue criminal charges against Gonzalez and Jara, and you allowed the matter to disappear from sight. (Fact Determinations ..., pp. 3, 13-15.)

8. The first two sentences of Cause I.H. were proven to be true. Finding 7 above deals with the failure to pursue criminal charges against Gonzalez and Jara.

Evidence presented at the Commission hearing was inconclusive to determine that Employee was untruthful in testifying at Judge Mudd's evidentiary hearing as follows: ". . . (1) You intended all along to prosecute Gonzalez and Jara including after the Kasim/Miner verdict, (2) Gonzalez's immigration matter needed to be resolved before Gonzalez and Jara could be prosecuted; and (3) the decision to prosecute Gonzalez and Jara was put over to the new District Attorney's administration. . .". Judge Mudd reported in his "Factual Determinations Per Appointment of Referee Report" that Employee did lie regarding these matters, but the preponderance of evidence presented at the Commission hearing did not support this position. Employee intended to charge Gonzalez and Jara, albeit with probation for the two defendants being Employee's recommended outcome of the prosecution. Mr. Neely's recollection of what occurred in 1994 in respect to the charging of Gonzalez and Jara was very sketchy. There was not sufficient evidence at the Civil Service hearing to establish that Mr. Gonzalez's immigration status and the change of District Attorney administrations were not legitimate concerns contributing to the delay in charging Gonzalez and Jara.

I. A Deputy District Attorney has a duty of complete honesty towards his colleagues and supervisors, particularly those assigned to review the deputy's actions in a significant matter involving serious allegations of misconduct. You lied to and misled your colleagues and supervisors regarding your knowledge of and involvement in Gonzalez's deportation matter during the Kasim/Miner trial. Your letters to Marci Ancel, notes in the I.N.S. file by attorney David Gappa dated July 12, 1994, and the testimony at the Kasim evidentiary hearing by I.N.S. attorneys Virginia Black and David Gappa, conclusively demonstrate that you knew Gonzalez was facing deportation at least by June 23, 1994, during the Kasim trial. It is also clear that you were discussing taking actions to prevent Gonzalez's deportation, including the expungement of past criminal convictions, with Mrs. Ancel and the I.N.S. during the Kasim/Miner trial. Before your letters to Mrs. Ancel surfaced, however, you maintained that you did not know about Gonzalez's deportation matter until well after Kasim was sentenced on August 15, 1994. You also led your colleagues and supervisors to believe that you did not contact I.N.S. officials and discuss expungement of Gonzalez's past criminal convictions with them as a means of preventing Gonzalez's deportation until after Kasim was sentenced. This false sequence of events is evidenced by your "Additional Progress Notes" dated "October, 1994" and by your memorandum to Chief Deputy District Attorney Keith Burt dated November 21, 1995. In addition, in February of 1996 you were told by Assistant District Attorney Gregory Thompson to fully cooperate with Deputy District Attorneys Carlos Armour and Kris Anton in their review of this matter for the District Attorney. During your subsequent conversations with Deputy District Attorneys Armour and Anton,

you again represented that you learned about Gonzalez's I.N.S. problems after the trial, failed to tell them about the Ancel letters and failed to tell them that you learned about Gonzalez's deportation problems and engaged in discussions with I.N.S. officials about the matter during the Kasim/Miner trial. Your motive for lying about your early knowledge of and involvement in Gonzalez's deportation matter was to cover up your above-described misconduct in making unauthorized assurances or promises to Gonzalez during the Kasim/Miner trial and your inexcusable failure to disclose this information to the defense in the Kasim/Miner trial.

9. Cause I.I. was proven to be true with mitigating circumstances. Mitigation regarding this charge relates to the last sentence about Employee's alleged motive for being untruthful regarding his involvement in the Gonzalez deportation matter. The undersigned Hearing Officer concludes that Employee was not truthful regarding the deportation matter because he wanted to assure that Gonzalez would fully cooperate with the D.A. in providing testimony and be available at the Kasim/Miner trial and cooperative for possible subsequent court proceedings. The undersigned concludes that Employee gave at least subtle indications to Gonzalez that he would be assisted regarding deportation and expungement of past criminal convictions by writing the two previously referenced letters to Gonzalez's immigration attorney, Marci Ancel. In one of the letters, dated June 23, 1994, he referred to past criminal convictions with an inference that expungement was possible. As stated above, these actions by Employee were a benefit to Gonzalez and they were not disclosed to the court, opposing counsel, and Employee's department.

J. A Deputy District Attorney has a responsibility to maintain the integrity of District Attorney files so that all relevant documents related to the case are not lost or destroyed. You failed to maintain critical documentation in the Kasim/Miner case file or actually removed such documentation. As described above, you wrote two letters to Gonzalez's immigration lawyer, Marci Ancel, in which you made significant representations about what actions would be taken regarding Gonzalez and in which you expressed your desire that Gonzalez not be deported. The timing of these letters proves that you had knowledge of and involvement in Gonzalez's deportation matter during the Kasim/Miner trial. These letters, particularly the letter dated June 23, 1994, are persuasive evidence that you committed misconduct during and after the Kasim/Miner trial. You claim the letters were in the file while it was under your control at least through October of 1994. (Declaration, p. 22; Kasim Evid. Hrg. R.T. pp. 465-466.) If so, then this supports the claim that you mislead your colleagues and supervisors because you make no mention of the letters and your contacts with Marci Ancel or the I.N.S. during the Kasim/Minor trial in your "Additional Progress Notes" dated "October, 1994" or in your memorandum to Chief Deputy District Attorney Keith Burt dated November 21, 1995. The truth is that your letters to Marci Ancel were not in the District Attorney's case file in 1996 when the file came under review by the District Attorney's administration and no one involved in the review process had a motive to remove or destroy the letters. The only conclusion is that you never put these letters in the file or you removed them later to cover up your prior misconduct.

10. Cause I.J. was not proven to be true. Employee did not have control of the Kasim files after 1994. The files were reviewed by a number of people, any of whom could have been responsible for removing and/or misplacing the documents.

It is true however, that the letters were not in the file and that Employee failed to mention the letters in the Kasim/Miner trial, in his additional progress notes, or his November 1995 memo to Keith Burt.

K. As an officer of the court and a public prosecutor you have a duty of complete candor and honesty with the Court. When called as a witness you have a legal obligation "to tell the truth, the whole truth and nothing but the truth." In your sworn testimony at the Kasim evidentiary hearing you sought to mislead Judge Mudd as to the sequence and substance of your conversations with I.N.S. attorneys Virginia Black and David Gappa regarding Enrique Gonzalez's deportation matter. When testifying at the Kasim evidentiary hearing you claimed ignorance about who you talked to prior to writing the June 23, 1994 letter to Gonzalez's immigration lawyer, Marci Ancel. (Kasim Evid. Hrg. R.T. p. 324.) You testified that your numerous discussions with I.N.S. attorney Black regarding Gonzalez's deportation matter and the effect of expungement of his prior convictions took place only after Kasim was sentenced and before you were able to implement then Assistant District Attorney Neely's order to file charges against Gonzalez and Jara. (Kasim R.T. pp. 330-335.) The evidence shows this testimony is false and misleading. As discussed elsewhere, on June 22 or June 23, 1994 you were contacted by Marci Ancel to write a letter in support of a her request to continue Gonzalez's upcoming deportation hearing. You admit that you called the I.N.S. before writing the June 23, 1994 letter to Marci Ancel. I.N.S. attorney Black testified at the Kasim evidentiary hearing that she recalled discussing with you expungement as a way to prevent a "witness" from being permanently deported from the United States. (Kasim Evid. Hrg. R.T. pp. 668-669, 674, 677-678, 687-688.) Your reference to decisions regarding Gonzalez's past criminal convictions in your June 23, 1994 letter to Marci Ancel is obviously a product of your conversations about expungement with I.N.S. attorney Black. You admitted in your testimony that your conversation with I.N.S. attorney Gappa took place "at the end," after your conversations with Virginia Black. (Kasim Evid. Hrg. R.T. p. 335.) Gappa's later testimony based on his notes in the I.N.S. file show you talked to him on July 12, 1994, the day of the Kasim/Minor verdicts. (Kasim R.T. pp. 693-696.) This is further evidence that you sought to mislead Judge Mudd as to the substance of your conversations with the I.N.S. attorneys during and immediately following the Kasim/Miner trial.

11. Cause I.K. was proven to be true. Ms. Black's testimony was that Employee contacted her before May 13, 1994, prior to the start of the Kasim/Miner trial.

L. As an officer of the court and a public prosecutor you have a duty of complete candor and honesty with the Court, opposing counsel and juries. As a public prosecutor you are under a legal and ethical duty to inform defense counsel of the full nature and scope of any promises or benefits given to important prosecution witnesses, particularly informants and accomplices, in exchange for their testimony in a criminal case. This duty includes the responsibility not to mislead the Court, defense counsel or juries as to the nature and scope of any such promises or benefits. This duty is constitutionally based because it so important to a criminal defendant's right to confront and cross-examine witnesses, as well as a criminal defendant's fundamental right to a fair trial. (*Brady v. Maryland*.) You seriously breached this duty in the Kasim/Miner trial to such a degree that reversal of Kasim's conviction by the appellate court appears likely. Throughout the Kasim/Miner case you repeatedly told defense counsel that both Gonzalez and Jara would be charged for their involvement in the Mustafa shooting, that the District Attorney's Office would make no deals with them for their cooperation and truthful testimony against Kasim and Miner, and that they simply had to trust the District Attorney's Office to be fair with them. It was generally understood within the criminal justice system that being "fair" with a cooperating individual offers that individual a hope of leniency in plea bargaining and/or at the time of sentencing on the individual's impending or pending criminal charges. This was certainly the impression you gave defense counsel in the

Kasim/Miner trial. And this was the impression that defense counsel argued to the jury when attacking the credibility of Gonzalez and Jara. It was not commonly understood, indeed it would have been unreasonable for the Court, defense counsel and the jury to have understood, that the promise by District Attorney's Office to be "fair" included taking extraordinary actions to prevent Gonzalez from being deported. Certainly, no one in the Kasim/Miner trial was told by you that the promise to be "fair" to Gonzalez included the possibility of taking actions regarding Gonzalez's past criminal convictions, including expungement, as a means to prevent Gonzalez's deportation. You had a duty to inform the Court and defense counsel that the concept of being "fair" in this case included the possibility of your taking such extraordinary and unusual steps in exchange for Gonzalez's testimony. Your failure to make these important disclosures precluded the defense from presenting to the jury the full range of benefits being offered Gonzalez. As a result the jury was misled as the full nature of Gonzalez's bias and motive while testifying during the trial, and the defendants in the Kasim/Miner were possibly deprived of fair trial.

12. Cause I.L. was proven to be true.

M. As a public prosecutor you are under a legal and ethical duty to inform defense counsel of the full nature and scope of any promises or benefits given to important prosecution witnesses, particularly informants and accomplices, in exchange for their testimony in a criminal case. This duty applies even after trial while the defendant's case is on appeal. You failed to comply with this duty by not informing Kasim's trial or appellate counsel after Kasim was sentenced, but while his case was on appeal, that you had conferred important and extraordinary benefits on Gonzalez and Jara in exchange for their cooperation and testimony in the Kasim/Miner case. In particular, you failed to inform defense counsel that you had expunged Gonzalez's prior criminal convictions in order to prevent him from being permanently deported from the United States. You also failed to inform defense counsel that you had determined not to file any charges against Gonzalez and Jara for their roles in the Mustafa shooting.

13. Cause I.M. was proven to be true in part and with mitigating circumstances. The last sentence in Cause I.M. was not proven to be true. It states, "You also failed to inform defense counsel that you had determined not to file any charges against Gonzalez and Jara for their roles in the Mustafa shooting". As stated above in Finding 7, Employee did inform his superiors of the status of the case, including reminders that Gonzalez and Jara needed to be charged. The District Attorney's Office never made a decision to not charge Gonzalez and Jara, but its non-action caused the charging to be delayed for an extensive period of time.

Cause I.M. relates primarily to Employee's alleged failure to inform appellant's counsel about benefits given to Gonzalez and Jara while the Kasim case was on appeal. In his Skelly report, Mr. Carlton took issue with this position and stated ". . .this duty, if it truly exists, is probably not known by the majority of the attorneys in the District Attorney's Office. . .". The undersigned Hearing Officer is relying on Mr. Pfingst's testimony that the duty does exist and that Employee's actions were remiss.

N. As an officer of the court and a public prosecutor you have a duty of complete candor and honesty in the cases you prosecute, as well as a duty to prevent perjury. In violation of these duties in the Harrell/Wilson case you were dishonest and lied to opposing counsel on an important matter and you contemplated telling witnesses to lie under oath and commit perjury. On May 15, 1992, the Harrell/Wilson case was assigned to Judge Exarhos with trial to commence on May 19, 1992. Later that day, you and then Deputy District Attorney Keith Burt, Chief of the Gang Prosecution Unit, appeared in camera before Judge Exarhos without defense counsel. You disclosed that a key eyewitness for the prosecution, Grace Langford, had been a confidential informant for law enforcement on matters unrelated to the Harrell/Wilson case. You sought a ruling from Judge Exarhos that this information need not be disclosed to the defense. Judge Exarhos asked for additional points and authorities. On May 18, 1992, you appeared alone in camera with Judge Exarhos with additional points and authorities. Judge Exarhos ruled the informant status of Langford was not relevant and need not be revealed to the defense. You then told Judge Exarhos that earlier that day one of the defense attorneys asked you whether the in camera hearings involved Langford's status as informant. You admitted to Judge Exarhos that you lied to the attorney by answering, "No. It's not about that." You also told Judge Exarhos that if the defense attorneys asked again about the topic of the in camera hearings you would continue to deceive them. Finally, pursuant to Judge Exarhos' ruling that Langford's informant status was not relevant or discoverable, you proposed to "instruct Miss Langford and any police officers that might know about her informant status to deny under oath that she's an informant ... ." (Harrell/Wilson R.T. Augment, pp. 20-21.) Fortunately, you did not act on this dishonest, unethical and illegal idea.

14. Cause I.N. was proven to be true with mitigating circumstances. The undersigned Hearing Officer makes this finding and conclusion partially based on the testimony and Skelly report prepared by Mr. Carlton. His report on Cause I.N. stated as follows:

> "CAUSE I.N. These allegations involve the handling of the informant in the Harrell/Wilson case. It is my firm belief that under the circumstances of that case at that time, Mr. Fitzpatrick's handling of the situation can not [sic] be called evidence of dishonesty. His supervisor was with him in an earlier appearance and recognized the danger the witness was put in if even the question of her informant status was posed in open court. Anyone who has ever handled informants understands that the mere invoking of 1041 EC in open court is tantamount to acknowledging the witness is an informant. Mr. Fitzpatrick took this matter to a superior court judge who approved of his conduct. Daily, judges instruct our witnesses to deviate from the truth...statements are 'redacted', probable cause can't be mentioned, and so forth. The vast majority of attorneys in this office would have handled the matter as Mr. Fitzpatrick did. While I believe the better resolution of this issue would have been for the judge to grant a [sic] 'irrelevant' objection to any question posed to determine if the witness was an informant, that tact might have proven deadly to the witness.
>
> This allegation manifests the naivete of those who haven't had to deal with real life informant issues in the court room. There is no more serious or legally tricky area of criminal law. Informants lives are actually at stake and a deputy who doesn't zealously protect informant's identity may find blood on his or her hands as a result. Once Judge Exarhos ruled the informant's status as such was irrelevant in this case, it may well be the best way to insure the safety of that witness was to have witnesses deny her true status. I appreciate and fully understand the ramifications of such a suggestion, and while it is something to be avoided at almost any cost, human life may require it. To sanction Mr. Fitzpatrick for these matters is wrong in my opinion."

Although it is repugnant to the undersigned Hearing Officer to realize that our legal system may accept less than the whole truth under limited circumstances, human life must be protected. In this particular case Employee was forthright with the judge regarding the potential dishonesty. He provided the judge with the reasoning for the proposed dishonesty, and the judge did not reject his proposal. In

the view of the undersigned, the judge and Employee were both involved in the potential dishonesty. Employee should not be singled out.

In a November 25, 1996 memo from Gregory Thompson, Assistant District Attorney, to all Deputy District Attorneys (DDA) he criticized a judge's opinion regarding Employee's action in the Harrell/Wilson case. Mr. Thompson stated to the DDA's, "You should know that this (judge's) opinion mischaracterizes the facts. The DDA, Jim Fitzpatrick followed the procedure prescribed in Evidence Code 1040, et seq., and the trial judge concluded, following two hearings, 'that the evidentiary value . . . is so minimal that it's . . . negligible. It's far outweighed by the dangers to which she (informant) would be exposed if her (prior cooperation) was revealed.'". Mr. Thompson, however, did not condone lying under any circumstances.

The Appointing Authority, District Attorney Pfingst, also testified that Cause I.N., given the circumstances, would not warrant a severe penalty if it were only an isolated instance of dishonesty.

CAUSE VI: You are guilty of incompetency under Civil Service Rule 7.2(a).

Your acts constituting incompetency are set forth in Cause I, paragraphs A through N above, and paragraph O as follows:

O. A public prosecutor has a duty to learn the full background of important prosecution witnesses in major felony cases, particularly the informant and/or criminal backgrounds of cooperating individuals such as accomplices. Through negligence or incompetence you failed to learn the full informant and criminal background of Gonzalez prior to the Kasim/Miner trial. On June 13, 1994, after the Kasim/Miner case was assigned to Judge Gill for trial, the defense discovery motion was litigated in limine. You, along with National City Police Department Officer Mark Musgrove and District Attorney Investigator Vincent Krolikowski, appeared in camera before Judge Gill without the defense to discuss the informant status of Gonzalez and Jara and past benefits they had received as a result of this status. The purpose of this in camera hearing was to provide Judge Gill with all such information about Gonzalez and Jara. Crucial information about Gonzalez's relationship with Officer Musgrove and Officer Musgrove's involvement in two of Gonzalez's past cases was not revealed to Judge Gill. Officer Musgrove later admitted he did not tell you or Judge Gill about these matters. However, this is no excuse for you not knowing more about these matters. In one case, the court records disclosed that Gonzalez had been sentenced after a probation revocation to do 92 hours of volunteer work at the National City Police Department. Further inquiry revealed that this consisted of Gonzalez giving information about gang-related matters to Officer Musgrove. In the other case, court transcripts showed that Officer Musgrove had appeared at a felony sentencing for Gonzalez. At the time you knew that Gonzalez had been arrested by Officer Musgrove for this offense and that the District Attorney's Office had filed felony charges (B97145). While you were instructed not to be involved in that case, this instruction did not preclude you from monitoring the progress of the case or finding out what happened after it was over. During the Kasim evidentiary hearing you admitted that you did not actively seek to monitor or follow up on this case. (Kasim Evid. Hrg. R.T. p. 259.) Thus, you failed to learn that Officer Musgrove had appeared on Gonzalez's behalf at the sentencing on this case. You also failed to learn that Musgrove's presence on behalf of Gonzalez motivated the Deputy District Attorney at that hearing to recommend a grant of probation despite Gonzalez's conviction of a serious felony offense with a prison presumptive requirement. As a result of your not fully learning the background of Gonzalez's prior cases, Judge Gill was not told about important information regarding Gonzalez's work as an informant for Musgrove and the benefits that flowed from that relationship. Indeed, you continued to falsely represent to defense counsel and the Court prior to Gonzalez testifying on June 24, 1994, that Gonzalez "never acted as an informant in any way for the National City Police Department or any other department, never received any benefits. . . . He never worked off any cases, nothing like that. There were no benefits, no money received, nothing like that." (Kasim Trial R.T. p. 644.) Also as a result of your not learning of this crucial information the defense was able to ambush you with this information on cross-examination of Gonzalez. (Kasim Evid. Hrg. R.T. p. 295.) Later the defense obtained a punitive jury instruction (*Zamora* instruction) based on the failure to disclose this information in response to Judge Gill's earlier discovery order.

15. Cause VI.O. was proven to be true.

16. Employee is guilty of all causes as listed as follows:
Cause I - Dishonesty; Cause II - Conduct Unbecoming an Employee of the County; Cause III - Failure of Good Behavior; Cause IV - Acts Incompatible with or Inimical to the Public Service; Cause V - Insubordination; and Cause VI - Incompetency as set forth in Cause VI.O. only.

The Order of Discipline contains clarifying language under Causes II - VI as follows: Cause II - ". . .Your acts constituting conduct unbecoming an employee of the County are set forth in Cause I, paragraphs A to N above". Cause III - " . .Your acts constituting failure of good behavior are set forth in Cause I, paragraphs A to N above". Cause IV - ". . .Your acts constituting conduct incompatible with or inimical to the public service are set forth in Cause I, paragraphs A to N above". Cause V - ". . .Your acts constituting insubordination are set forth in Cause I, paragraphs D, G, I, and J above". Cause VI - ". . .Your acts constituting incompetency are set forth in Cause I, paragraphs A through N above, and paragraph O as follows". (See VI.O. above.)

Although all of the charges were not proven as stated above, sufficient charges were proven to indicate that Employee is guilty of all causes.

17. Deputy District Attorney Louis Boyle testified at the Commission Hearing regarding his involvement in the Kasim/Miner follow-up, including any potential charging of Gonzalez. The undersigned Hearing Officer found Mr. Boyle's testimony to be very credible. Following is some of the most significant testimony of Mr. Boyle, all of which is concluded to be truthful:

A. In 1995, during his preliminary review to determine whether or not Gonzalez should be charged, he went to the D.A.'s Special Operations Division to review the Confidential Informant Benefit Record (CIBR) regarding Gonzalez. He found no benefits recorded for Gonzalez. ". . .That was just another bit of information to me that. . .all of the things done for Enrique Gonzalez were not maintained in Special Operations. To me that meant that they were kept confidential to the Gang Unit or Mr. Fitzpatrick. But that was an important thing in my conclusion that immunity had been granted. . ."

B. Mr. Boyle characterized the Gang Unit as operating outside of the Department's standards. At the Commission hearing Employee asked Mr. Boyle if the Gang Unit, under the direction of Mr. Burt, did things differently than the rest of the

department. Mr. Boyle's response was "That is the understatement of the century. . .". Mr. Boyle went on to testify that during Mr. Burt's fourteen years in gang related prosecution he never completed a CIBR. ". . . The nature of the operation is to operate in a manner that keeps information confidential and away from the world. It's the nature of the beast and the way, in my opinion, Gangs was formed for good reasons. . .And over the years they dealt with cases that require using criminals as witnesses to prosecute criminals. And it's a very dangerous path once you start down. . .".

C. Following his review, Mr. Boyle recommended to ADA Thompson that Gonzalez not be charged because of immunity previously granted to him.

D. Approximately one month after his recommendation to ADA Thompson, Mr. Boyle was asked by Mr. Burt to review several other cases relating to Employee. After commenting respectfully of Mr. Burt's position in the D.A.'s Office, Mr. Boyle testified at the Commission hearing ". . . I told Mr. Burt this is nothing but a request for me to investigate this (D.A.'s) office. . .". Subsequently, Mr. Boyle was taken off the assignment and other Deputy D. A.'s were directed to review certain cases relating to Employee.

18. Even though the undersigned conducted a twelve day hearing related to the Employee it is unlikely that the hearing resulted in complete information regarding gang prosecution. As a result of Mr. Boyle's testimony, and other oral and written evidence, the undersigned Hearing Officer concludes that there was much activity within the Gang Unit relating to the handling of confidential informants that will likely never become public. The undersigned further concludes that the Gang Unit at times has operated outside of the standards generally applicable to the District Attorney's Office. Whether the unique aspects of gang prosecution warrants the degree of secrecy that has been afforded gang operations and the degree of freedom offered to prosecutors in the Gang Unit are questions for the District Attorney to resolve.

19. In spite of the awareness and involvement of Mr. Neely and Mr. Burt in not charging Gonzalez and Jara for their roles in the Mustafa shooting, and in spite of other employees in gang prosecution sometimes operating outside of the offices standards, Employee was still accountable for his own actions.

20. The undersigned suggests that standards for truthfulness and integrity should be uniformly applied throughout the D. A. Office. It would be normal to establish and maintain standards that are unique to the various units. However, significant standards such as truthfulness should be uniformly applied throughout the office. All employees should be accountable, including supervisors and managers.

21. This disciplinary action is tragic for both Employee and the District Attorney's Office. Employee was a relatively long-term, successful employee with above-standard performance appraisals indicating that he was a valued attorney in the office.

As stated above, Employee's primary downfall was his dishonesty regarding the benefits provided to Gonzalez in the Kasim/Miner judicial process. The question then becomes, should a long-term, successful, and previously valued employee be terminated for the dishonesty and other violations specified above? The undersigned Hearing Officer concludes that Employee should be terminated for his dishonesty and other violations. Employee lied to opposing counsel, his department managers, and the courts and his untruthfulness continued over a period of years. Irrespective of Employee's past contributions to the department, trustworthiness is an essential ingredient in the employment of any Deputy District Attorney. In this case, trust was significantly breeched to the extent that Employee's further employment in the D.A.'s is not reasonable.

RECOMMENDATIONS

Based on the findings and conclusions above, I recommend the following proposed decision:

1. That the Order of Termination imposed by the District Attorney is affirmed; and

2. That the proposed decision shall become effective upon the date of approval by the Civil Service Commission.

Commissioner Dixon expressed various concerns regarding the manner in which Department policies are practiced within the District Attorney's Office. He sugggested that certain witnesses in the hearing were subject to selective amensia. The hearing revealed that other employees in the Gang Unit operated outside of office standards, however, were not subjected to disciplinary action. Mr. Fitzpatrick should be held accountable for his actions, however, those actions appeared to be in compliance with office practice. Terminating an individual for company policies that have not been practiced is a very serious issue.

Commissioner Brummitt commented that Mr. Fitzpatrick may have been singled out, however, the issue was addressed in the findings suggesting that standards for truthfulness and integrity be uniformly applied throughout the District

Attorney's Office. She stated that due to judges' criticisms regarding Mr. Fitzpatrick's conduct and a trial having been set aside, Mr. Fitzpatrick's actions were extreme.

Commissioner Valencia-Cothran responded as to the difficulty of this case. She questioned the lack of memory of some of the witnesses and expressed concerns that others were not disciplined. However, Mr. Fitzpatrick's lack of honesty violated a defendant's right to a fair trial. Mr. Fitzpatrick failed to exercise other options and clearly lied to a judge. He had the opportunity to be honest and he was not. She explained that the Commission makes decisions based on the evidence presented at the hearing. At times those decisions are difficult; this was a particularly hard decision. Commissioner Valencia-Cothran commented that the letter to be sent to the District Attorney will not be made public because it relates to personnel issues. However, it will clear up some of the issues that concerned the Commission regarding related matters revealed during the hearing.

Commissioner Austin commented that the Commission is instructed to deal with the charges and causes that are brought against a particular individual. Some Commissioners had difficulty in this case because in and of itself it does not tell the whole story. There is agreement that Mr. Fitzpatrick did much of what he was charged with. However, he was not alone. The Commission's decision-making must be based upon particular charges against a particular individual. Commissioner Valencia-Cothran and Commissioner Austin will write a letter to the District Attorney expressing concerns that were not part of the charges and causes in this case. Commissioner Dixon alluded to selective discipline having occurred in this matter. However, that is not within the purview of this body to deal with other than by way of an informal communication to the District Attorney. The Commission fully recognizes that a man who had given many years of honest and decent service to the Department has suffered a great deal of grief and aggravation over this, however, is not without fault in the matter. On that basis we have to uphold much of what was charged. It is done reluctantly.

Motion by Valencia-Cothran to approve Findings and Recommendations; seconded by Brummitt. Carried.
Dixon – No.
Pate – Abstained.

DISCRIMINATION

Complaints

5. Verbal and written report from Gordon Austin, Civil Service Commission President.

RECOMMENDATION: To consider verbal and written report from Commission President. (Continued from 6/3/98 meeting.)

Commissioner Austin addressed the fact of EOMO's dissolution as of July 3, 1998. The Commission is dealing with the procedures that will be adopted relating to discrimination complaints filed with the Commission and the manner in which they will be processed. The Commission has sought advice from County Counsel regarding the current language of the Rules and the Charter. At the Commission's direction, Mr. Austin and Mr. Cook met with Mr. Arauz, Director, DHR and Mr. Villa, the CAO's Internal Affairs Officer CAO, to determine how to best process pending complaints timely and make a recommendation to the Commission. Options discussed at the last Commission meeting were: (1) the Commission itself to conduct initial investigations regarding complaints of discrimination. The ancillary question is that of staffing and funding; (2) a suggestion by the CAO's office to refer such complaints to its Internal Affairs Office; and (3) the Commission to appoint an outside agency or attorney to conduct such investigations prior to the Commission itself reviewing it. The Commission has the authority to conduct discrimination investigations. It has the right to disagree with the recommendation of anyone or body with whom it subjugates that duty. Subsequent to discussions with the DHR Director and further instructions from County Counsel, the Commission has been advised that the Internal Affairs Office (OIA) can act to replace EOMO prior to an official Rule amendment. The Commission may refer discrimination complaints to OIA as we did with EOMO. Commissioner Austin recommended that, until further or different direction from County Counsel is received, and in order to expedite pending and complaints received in the immediate future, that County Counsel's recommendation to refer such matters to the CAO's OIA for initial investigation be adopted. The ultimate decision lies with the Commission. Commissioner Austin commented that there may be several long-term solutions, however, the Commission needs to adjudicate the pending cases and others that will be received in the immediate future.

Commissioner Valencia-Cothran expressed concerns regarding forwarding complaints to OIA. She explained the evolution of EOMO and the need for its independent nature. EOMO was involved with affirmative action and ensuring outreach and appropriate consideration to diversity in the County. She queried as to OIA's involvement in ensuring County-wide

diversity. She does not believe OIA to be the appropriate location to refer discrimination complaints. She believes it would be beneficial for the Commission to process discrimination complaints internally. She expressed a desire for the Commission to have been given one of EOMO's investigator positions. Commissioner Valencia-Cothran expressed concerns that it would take only one discrimination case to be challenged in the courts to create great liability to this County. She commented that judgments in discrimination cases are prohibitive and much greater than the Commission's annual budget. The Rules direct the Commission to send discrimination complaints to EOMO. She expressed concerns about County officials making decisions about Commission responsibilities (interaction with EOMO) without contacting our office for input. She would not want to be a person bringing a discrimination complaint before the Office of Internal Affairs. She stated there is a need for an independent entity to conduct these investigations. She used the analogy that the Citizens' Law Enforcement Review Board (CLERB) was created to investigate citizens' complaints relating to internal investigations conducted by the Sheriff's Department. She asserts that utilizing OIA to conduct discrimination investigations will result in the establishment of another review board. She suggests that the Civil Service Commission appoint an investigator to investigate discrimination complaints and then it could use OIA if it chooses or refer the complaints to another source.

Commissioner Brummitt commented that she agreed in principle with Commissioner Valencia-Cothran and expressed concerns about allowing the responsibility for discrimination complaints to get too far away from the Commission. She sees no other alternative at this time other than to refer complaints to OIA. The Commission will have to be very vigil and view this as a temporary remedy.

Larry Cook explained that Rule VI will have to be changed. In order to effect a Rule change it will have to be met and conferred upon. To seek a Rule change the Commission can make the proposal to replace EOMO with OIA and request the DHR Director and the Manager of Labor Relations to meet and confer on that matter. The Commission m y initiate it or it could wait for another source to make a recommendation for a change.

Arne Hansen, Deputy County Counsel, advised that the Commission has in place Civil Service Rule 6.1.3 which allows the Commission to appoint an officer or hearing panel for these types of investigations. Deputy County Counsel Ralph Shadwell's recommendation at the Commission's last meeting was to use that vehicle until such time as the Commission has a complete overhaul of its rules and substitutes another agency for EOMO in the Rules. The

Commission has a vehicle to appoint a County officer to do its investigations in the interim period. The Commission does not need a Rule change for that. Ultimately, the Commission's Rules will have to change eliminating references to EOMO and substituting another entity suitable to perform discrimination investigations. Mr. Hansen clarified that County Counsel is not suggesting that the Commission has to appoint OIA, it is indicating that the Commission has the legal authority to appoint some officer to perform the function.

Deborah Olberding, S.E.I.U. Local 2028, addressed the Commission stating that the Commission's counsel is incorrect in his interpretation of Rule 6.1.3. She contends that the Commission must investigate complaints concurrent with EOMO.

Since EOMO is gone, the Commission has to change the Rule before it delegates discrimination investigations elsewhere. The Rule amendment needs to be accomplished through the meet and confer process. The Commission may not hire someone else, it may not give it to OIA. The Commission must change the Rule. She explained that there are consequences for failure to meet and confer and the Union will assert its rights in dealing with those consequences.

Motion by Austin to refer discrimination complaints to the CAO's Internal Affairs Office; Seconded by Dixon. Carried.
Valencia-Cothran – No.

Motion by Dixon to refer the matter to staff for recommendation as to a Rule change as well as the process to be followed to put it into place; seconded by Brummitt. Carried.

6. **Mike Chase** alleging national origin discrimination by the Health and Human Services Agency. (Continued from CSC 6/3/98 meeting.)

RECOMMENDATION: Take action according to today's action in No. 5 above.

Motion by Brummitt to refer to Office of Internal Affairs (OIA) for initial investigation of the complaint and report back to the Commission; seconded by Dixon. Carried. Valencia-Cothran assigned as hearing officer.

Findings

7. Commissioner Austin: Deborah Olberding, S.E.I.U., Local 2028, on behalf of **Adell Burge,** an employee in the Department of the Public Defender alleging union affiliation discrimination by

the Departments of the Public Defender and Human Resources. (See also No. 8 below.) (Continued from CSC 6/3/98 meeting.)

FINDINGS AND RECOMMENDATIONS:

The complaint was forwarded to EOMO for investigation and report back to this Commission. The report of EOMO has been received and reviewed by this Investigating Officer, who concurs with the findings that complainant failed to establish allegations of discrimination based on union and political activities; probable cause that a violation of discrimination laws occurred in this matter was not established. Therefore, it is recommended that Adell Burge's complaint be denied; and that the Commission approve and file this report with the appended EOMO Investigative Summary with a findings of no probable cause that the Complainant has been discriminated against on any basis protected by law.

Motion by Austin to approve Findings and Recommendations; seconded by Brummitt. Carried.
Valencia-Cothran – No.
Pate – Abstained.

SELECTION PROCESS FINDINGS/COMPLAINTS

Complaints

8. Deborah Olberding, S.E.I.U. Local 2028, on behalf of **Adell Burge,** an Intermediate Transcriber in the Department of the Public Defender appealing DHR's denial to allow her to compete in the selection process for Criminal Secretary II. (See also No. 7 above.) (Continued from CSC 6/3/98 meeting.)

RECOMMENDATION: Deny request.

Ms. Burge addressed the Commission regarding the numerous experiences she has had being certified, interviewed and rejected for promotion from the Department of the Public Defender since she has become a shop steward for SEIU, Local 2028. She contended that there had been a pattern of discrimination as demonstrated by her high ranking on the list and consistent non-selection.

Blair Provo, on behalf of DHR, responded that the request was initiated by the District Attorney's Office and that request included the use of an application rating process instead of a written exam. She cited several reasons for the rationale. Subsequent to discussions with the District Attorney's Office, Ms. Provo contacted the Public Defender's Office because they also are users of CLSI's and II's in order to determine if the application rating process was satisfactory with them. Ms. Burge is an Intermediate

Transcriber Typist and it is DHR's judgment that she does not meet the eligibility requirements for CLSII.

Motion by Valencia-Cothran to grant a hearing; seconded by Dixon. Carried.
Brummitt – No.
Commissioner Dixon assigned as hearing officer.

Findings

9. **John M. Ross** appeal of removal of his name by DHR from the employment list for Court Service Officer and Corrections Deputy Sheriff for failure to meet the employment standards.

10. **Darrin T. Rimmer** appeal of removal of his name by DHR from the employment list for Correctional Deputy Probation Officer I for failure to meet the employment standards.

RECOMMENDATION: Ratify Item Nos. 9 and 10. Appellants have been successful in the appellate process provided by Civil Service Rule 4.2.2.

Ratified.

OTHER MATTERS

Extension of Temporary Appointments

11. Health and Human Services Agency

3 Residential Care Worker I's (Frances Magwood, Xochitl Morehouse, Joe Costa)

RECOMMENDATION: Ratify item No. 11.

Ratified.

12. Ratification of Jonathan Schleimer, M.D., neurologist, as an additional name to the list of medical and psychological providers to be used for fitness for duty evaluations at the request of the Department of Human Resources.

RECOMMENDATION: Ratify provider.

Ratified.

13. Administrative Manual Amendments.

RECOMMENDATION: Direct staff to revise the policies and procedures in draft form and to review with the President of the Commission for his approval. Forward the draft amendments to the CAO's office and place on the Commission's next agenda for ratification.

Staff recommendation approved.

14. Public Input.

Kenneth Breman addressed concerns he had regarding fairness in closing the Fitzpatrick hearing at the conclusion of the Department's presentation. Commissioner Valencia-Cothran clarified that the request to close the hearing came from Mr. Fitzpatrick. Mr. Breman also suggested that the Commission may want to explore the feasibility of obtaining the services of an investigator for the discrimination complaints from the school of Criminal Justice at San Diego State University.

ADJOURNMENT: 5:10 p.m.

NEXT MEETING OF THE CIVIL SERVICE COMMISSION WILL BE JULY 1, 1998.